

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CLINTON E. WILKINS
Claimant

VS.

FEDEX GROUND PACKAGING SYSTEM, INC.
Self-Insured Respondent

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Docket No. 1,021,103

ORDER

Claimant requested review of the January 30, 2007 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on May 2, 2007.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Jennifer L. Arnett, of Overland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties stipulated that average weekly wage is no longer in dispute and the ALJ's factual finding on that issue can be summarily affirmed. The parties also agreed that claimant was paid \$3,213.91 in temporary total disability benefits over a period of 25.57 weeks which yields a rate of \$125.69, which is an underpayment and should be corrected.

ISSUES

The ALJ awarded the claimant a 2 percent permanent partial impairment to his right foot as a result of his work-related injury, adopting the opinions and impairment assessment offered by Dr. Susan Bonar, claimant's treating physician. In doing so, the ALJ wholly rejected the testimony offered by claimant's retained physician, Dr. Lynn Curtis.

The claimant requests review of this Award and asserts the ALJ's decision is not supported by the evidence. Claimant maintains the opinions of his expert, Dr. Curtis, are

far more persuasive than those offered by Dr. Bonar. Claimant suggests the Award should be modified to reflect the impairment opinion offered by Dr. Curtis, namely a 32 percent permanent partial impairment to the foot.

Respondent argues that the ALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

There is no dispute that claimant suffered a work-related injury to his right foot on August 14, 2004. He was treated by Dr. Susan Bonar, an orthopaedic surgeon, who, in addition to her examination, also ordered a MRI. The results of the MRI were unremarkable. Other tests and office evaluations reflected no evidence of fractures, nerve damage or neuritis. Dr. Bonar ultimately concluded that claimant's accident caused claimant's preexisting hammer toe condition to become symptomatic. Surgery was performed on November 3, 2005 to straighten the 4th and 5th toes on claimant's right foot.

After he recovered from the surgery, Dr. Bonar assigned a 2 percent impairment to the right foot for the residual stiffness and pain in the toes. At her deposition she testified that claimant did not have any lis franc injury as that condition, which involves a strain to the patient's arch, was conclusively ruled out by the MRI. Thus, his impairment was limited to the foot.

In stark contrast to her opinions are those offered by claimant from Dr. Lynn Curtis. Dr. Curtis saw claimant one time and assessed his impairment at 32 percent to the foot. This was based upon what he concluded were digital nerve injuries and a lis franc arthralgia. Dr. Curtis is not an orthopaedic surgeon, nor does he routinely treat patients with foot problems. Rather, he is an independent medical examiner for the Social Security Administration and a medical/legal expert.

As noted by the ALJ, Dr. Curtis' opinions about claimant's condition are less credible than those of Dr. Prostic. The ALJ said -

Dr. Curtis saw the [c]laimant on September 6, 2006. His misapprehension of the [c]laimant's medical history is astounding. He was under the mistaken impression that Dr. Bonar had diagnosed fractures in the 4th and 5th toes, but that the insurance carrier would not let her treat this. In his written report he states that Dr. Bonar had diagnosed a stress fracture contusion of the fourth metatarsal, and a fracture of the distal phalanx; there is absolutely no support for this statement. Dr. Curtis did not possess any of Dr. Bonar's records except for her rating report. Dr. Curtis was unaware that Dr. Bonar had performed any surgery, even though the rating report

mentioned the area on the foot that "was healed nicely," and he failed to notice the surgical scars. He also concluded the [c]laimant suffered from nerve damage and lis franc arthralgia. Dr. Bonar explained that the MRI conclusively showed the [c]laimant did not have a lis franc injury, and in her treatment of the [c]laimant there never was any indication of any nerve injury.¹

The Board has considered the parties' arguments, their briefs and the contents of the record and finds the ALJ's Award should be affirmed. Dr. Curtis' credibility was, at best, compromised. Under these circumstances, the ALJ's decision to wholly disregard his opinions and adopt those of Dr. Bonar, claimant's treater and an orthopaedic surgeon, was well reasoned. Thus, the Award should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated January 30, 2007, is affirmed, although the calculation of the Award must be corrected to reflect 25.57 weeks of TTD at a rate of \$150.00.

IT IS SO ORDERED.

Dated this _____ day of May 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Jennifer L. Arnett, Attorney for Self-Insured Respondent
Bryce D. Benedict, Administrative Law Judge

¹ ALJ Award (Jan. 30, 2007) at 2-3.